FILE COPY

Office - Supreme Court, U. S.
FILED
APR 11 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 561

STANDARD COMMERCIAL TOBACCO COMPANY and STANDARD COMMERCIAL STEAMSHIP CORP.,
Petitioners,

v.

JOHN W. SNYDER, Secretary of the Treasury, and UNITED STATES OF AMERICA.

PETITION FOR REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF

HAROLD G. ARON,
726 Jackson Place, N. W.,
Washington, D. C.,

RAYMOND L. WISE,
80 Broad Street,
New York, N. Y.,

RICHARD L. MERRICK,
1025 Vermont Ave., N. W.,
Washington, D. C.,
Attorneys for Petitioners.

APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

INDEX

PAGE

PETITION FOR REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 1

JURISDICTION 1

REASONS FOR PETITION FOR REHEARING 2

CONCLUSION 7

CERTIFICATE OF COUNSEL 8

BRIEF IN SUPPORT OF PETITION 9

Table of Cases Cited

Bradford *v.* Chase National Bank of New York, 24 Fed. Sup. 28, 309 U. S. 632, 84 L. Ed. 990 13

Carl Byoir Associates *v.* Tsune-Chi, 112 F. 2nd 885 6

Hartford Accident and Indemnity Co. *v.* Petroleum Royalties Co. of Oklahoma, et al., 24 Fed. Sup. 759, 308 U. S. 626, 84 L. Ed. 522 13

Parker State Bank *v.* Pennington, 9 F. 2d 966 6

Williams *v.* Heard, 140 U. S. 528, 35 L. Ed. 530 (1891) 2, 4

Statutes, Treaties, Reports, Etc.

	PAGE
Act of Feb. 27, 1896, 31 USCA 547	4
Communication of Sec. of State Hughes on Hearing Before Ways and Means Com., 69th Cong., Nov. 19, 1926, p. 253	10
Court of Claims Act, as Amended June 25, 1948, 28 USCA 1491	3
Federal Tort Claims Act, 28 USC 921	3, 12
Harrison Resolution, 48 Stat. 1277	
House Doc. No. 483, 69th Cong., p. 16	10
Messages of Pres. Coolidge, Dec. 6, and 7, 1926	10
Rep. of Sec. of Treas, 1928, p. 356	10
Senate Doc., No. 99, 69th Cong., p. 2	10
Statement of Mr. Bankhead re H.R. 7201, Cong. Rec., Vol. 69, Part I, 70th Cong., 1st Sess., p. 897	10
Statement of Sec. of Treas. Andrew Mellon re H.R. 10826, 69th Cong.	10
Statement of Pres. Truman, Cong. Rec. App., Aug. 12, 1947, p. A-5252	10
Trading with the Enemy Act of 1917	12
Treaty of Berlin	4, 10
Settlement of War Claims Act of 1928	12
War Claims Act, 80th Cong., 2d Sess., Ch. 826, Sec. 13(a)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 561

STANDARD COMMERCIAL TOBACCO COMPANY and STANDARD COMMERCIAL STEAMSHIP CORP.,
Petitioners,

v.

JOHN W. SNYDER, SECRETARY OF THE TREASURY, and UNITED STATES OF AMERICA.

PETITION FOR REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Come now the petitioners and present this petition for a rehearing on the petition for a writ of certiorari filed in this case.

Jurisdiction

The petition for certiorari was filed on February 3, 1950, and denied on March 27, 1950. This petition for rehearing is filed within fifteen days from March 27, 1950, in accordance with Rule 33 of this Court.

Reasons for Petition for Rehearing

In applying for this rehearing, your petitioners reiterate each and every ground set forth in the original petition, and further suggest to the Court the matters hereinafter discussed.

This petition is made because the petitioner's reply brief was not completed until the very day on which the Court denied this application. The contents of the Reply Brief are printed at the end of this application for rehearing of the petition, exactly as the brief was about to be sent to the printer on March 27, 1950. The Clerk of the Court had been informed by telegram, immediately on receipt of the Respondents' Brief, of the intention to file a Reply Brief.

The necessity for the Reply Brief and its chief purpose was to bring to the attention of this Court the fact, which was not disclosed in either brief, before the Court, that *Williams* v. *Heard,* 140 U. S. 528, on which the Respondents appeared chiefly to rely, had been, in effect, nullified five years later by an act of Congress on February 27, 1896 (31 USCA 547). Both sides had cited the *Williams* case; the appellants, by inadvertence, had not referred to the subsequent statute, as they had alluded to the *Williams* case only as one of fifteen authorities (page 21 of the Petitioners' Brief) supporting the principle recognized by Chief Justice Marshall in the *Bank of United States* case (9 Wheat. 904) that the United States could be held to performance of the duties of a trustee. The Respondents cited the *Williams* case, twice on page 12 of their brief, as the controlling authority and nowhere made mention of the subsequent and countervailing statute of 1896.

Through the entire Federal judicature, the opinions announced in this case have totalled merely three sentences, yet it must be admitted that the case is of novel impression; that it involves upwards of $100,000,000 indisputably due to American citizens; that it brings before the Court historic and recent precedents in its own decisions and those of the English courts; that it calls for the first time for the construction by this Court of a far reaching statute of great and immediate importance, enacted in 1896, five years after the *Williams* case and, perhaps, as the result thereof; and presents for the first time the question of the reconciliation of the Federal Tort Claims Act (28 USC 921) and the Court of Claims Act, as amended June 25, 1948 (28 USCA 1491).

That these petitioners have suffered a wrong has been repeatedly and recently conceded by officials of the highest rank in the government of the United States, as shown in the appended proposed Reply Brief. There has been a wrong, there appears to be no remedy, in view of the denial of this petition, even though the United States has shed its robes of sovereignty and subjected itself to suit for any wrong "under circumstances where the United States, if a private person, would be liable." It would seem that in such circumstances an even higher duty rests upon the officials of government than on private counsel to aid in rectifying this wrong, and yet the Department of Justice has, before this Court, relied on the *Williams* case, without disclosing to the Court the subsequent action of the Congress as to the disposition of funds received from foreign governments for citizens of the United States.

In denying this petition, the Court has sanctioned the dismissal of the complaint with no opportunity to amend and has deprived the plaintiffs of any possibility of

presenting their evidence or curing any defect in the allegations of the complaint by supplying the proof of any missing essential of their causes of action. The Court has thereby answered in the negative these questions:

> Have these petitioners any remedy for the wrong done them?
>
> If they are not within the Federal Tort Claims Act, are they, by virture of statute (28 USCA 1346 and 1491), entitled to sue in the United States District Court and/or the Court of Claims under the fourth and fifth provisions for its jurisdiction —for money had and received for their benefit under the Act of February 27, 1886, clearly a cause of action "founded upon any express or implied contract with the United States" or "for liquidated or unliquidated damages in cases not sounding in tort"?

ARGUMENT

POINT I

Since the Treaty of Berlin the United States (by virtue of the Act of February 27, 1896 (31 USCA 547)), has held in trust all German assets delivered under it.

This legislation, enacted after the decision of this court in *Williams* v. *Heard,* on May 25, 1891, provides:

> "All moneys received by the United States from foreign governments and other sources in trust for citizens of the United States and others, shall be deposited and covered into the Treasury. * * * Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment of the ascertained beneficiaries thereof."

The language in the text of the act reads "*from foreign governments and other sources.*" Certainly it can not be argued that the seized German assets from the First World War were received for any other purpose, in view of the language of the Treaty of Berlin, the Debt Settlement Agreement and contemporary action by the Congress, particularly in view of the fact that it had been the traditional and avowed policy of this country from its inception not to confiscate private property as war booty. The words "other sources" are here too significant to be sloughed off. Concededly, the assets from the Second World War come from "other sources" for there is as yet no treaty and in fact no surviving German government to make one. We believe it absolutely sound, or at least sufficiently serious for this Court to hear argument thereon, for us to contend that with a half billion defaulted German bonds in the hands of the United States, held for the benefit of these awardholders, it follows as a matter of law that the German assets seized in the Second World War are funds "in trust for citizens of the United States."

POINT II

Petitioners believe they have the right to elect whether they would proceed (a) in equity for specific enforcement of the trustee's duties, as they have endeavored to do in their second prayer for relief; (b) under the Federal Tort Claims act for the conversion of trust funds held for their benefit as they do under their first prayer for relief; and as implied in the Respondent's Brief and the cases cited by them at page 16 (*Carl Byoir Associates* v. *Tsune-Chi*, 112 F. 2d 885, and *Parker State Bank* v. *Pennington*, 9 F. 2d 966) for money had and received, by virtue of the provision of the Act of April 27, 1896, aided by the practical construction placed upon it by the accounting methods adopted by the Secretary of the Treasury in the disposition of the funds resulting from the liquidation of the German assets and the recent action of the Congress in the War Claims Act (Chapter 826, 80th Cong., 2d Session), which retains in the Congress the control and disposition of the funds resulting from seizure during World War II and does not put them under the Act of February 27, 1896.

The foregoing two points, added to those set out in our petition for writ of certiorari and the briefs below, indicate the problems which have confronted counsel for the petitioners. To them it has seemed clear that these petitioners, clearly wronged as they are by act of the United States, have some right or rights and, believing that the ancient maxim—*ubi jus, ibi remedium*—has not become obsolete are convinced, through careful study, that these petitioners have available to them alternate causes of action, as to which the doctrine of election of

remedies does not apply; that they may sue both at law and in equity; *ex contractu* and *ex delicto;* under treaty and statutes of the United States; and that the complaint states good causes of action and should not be summarily dismissed without the plaintiffs being afforded a right to amend, if there has been an omission in their pleadings, as they would be in any ordinary case fraught with no such intricacies as is the instant action. We have faith that on re-consideration the Court will agree that this case merits a full hearing by the full court, and, on full presentation of the treaties, statutes and legal principles involved, that it should not be disposed of on a necessarily limited and inadequate presentation by petition for writ of certiorari on which counsel are inarticulate. Happily to two members of the Court this is not a new issue: the Chief Justice, then as Secretary of the Treasury, was cognizant of the origin of the action, and another, as Attorney General, of its initial defense.

Conclusion

For the foregoing reasons and those set forth in the following brief, the petitioners respectfully urge that a rehearing be granted; that upon further consideration that the order of March 27, 1950, denying the petition for certiorari be revoked, and that the writ of certiorari issue as prayed.

HAROLD G. ARON,
RAYMOND L. WISE,
RICHARD L. MERRICK,
Attorneys for Petitioners.

I, Harold G. Aron, of counsel for petitioners, Standard Commercial Tobacco Company and Standard Commercial Steamship Corp., do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

HAROLD G. ARON,
Of Counsel for Petitioners.

PROPOSED REPLY BRIEF FOR APPELLANTS

The sole purpose of this brief is to answer three statements made in Respondents' brief.

Pages 2 and 14: The only provision the Congress has made as to enemy property, seized during the Second World War, is contained in Sec. 13 (a) of the War Claims Act (Chapter 826, 80th Cong., 2d Sess.) which reads as follows:

> WAR CLAIMS FUND
>
> SEC. 13. (a) There is hereby created on the books of the Treasury of the United States a trust fund to be known as the War Claims Fund. The War Claims Fund shall consist of all sums covered into the Treasury pursuant to the provisions of section 39 of the Trading With the Enemy Act of October 6, 1917, as amended. The moneys in such fund shall be available for expenditure only as provided in this Act or as may be provided hereafter by the Congress.

Due to the amounts of property seized during the Second World War, this does not appear to impinge on the rights of the petitioners, now here; were it found to do so, the constitutionality of the Act would be attacked on the ground that the Congress was without power to make any disposition of the enemy property seized during the Second World War, except subject to the trust with which it was impressed in favor of these petitioners and others similarly situated, because of the default in the German bonds held for their benefit.

Page 12: Williams *v.* Heard, 140 U.S. 529, does not conflict with the petitioners' position; if it is to be cited against them, then some reference should have been made

by Respondent to the fact that it was decided in 1891 and was directly affected by act of Congress on February 27, 1896 (31 USCA 547) and also to Administrative Decision No. V (Parker, Umpire) of the Mixed Claims Commission, United States and Germany.

Page 13: The trust *res*, as here referred to, had no such origin as is stated by respondent. Historically, as far as these awardholders are affected, the *res* originated on August 21, 1921, in the Treaty of Berlin which embodied the provisions of the earlier Treaty of Versailles (Art. 297), and has been so regarded since that time. (Messages of Calvin Coolidge as President of the United States of December 6 and 7, 1926, Sen. Doc. No. 99, 69th Congress, page 2; H. Doc. 483, 69th Congress, p. 16; Report of the Secretary of the Treasury for 1928, page 356; Communication of Charles Evans Hughes as Secretary of State on hearing before Ways and Means Committee of the House of Representatives, 69th Congress, November 19, 1926, page 253; statement of Andrew W. Mellon as Secretary of the Treasury on hearings before sub-committee on Ways and Means, HR 10820, 69th Congress; Secretary of the Treasury, Sen. Doc. No. 99, 69th Congress, page 2; Report of Secretary of the Treasury for 1928, page 356; statement of Mr. Bankhead on H.R. 7201 Cong. Record, Vol. 69, Part 1, 70th Congress, 1st session, page 897; President Truman, Cong. Record App. August 12, 1947, p. A 5252.)

It is not necessary, under the present complaints, however, to go back to these early origins or further than the Settlement of War Claims Act of 1928, when the United States, as it was under the compulsion of doing by the paramount law of the Treaty of Berlin, affirmed its duties as trustee for the awardholders and committed the great blunder and breach of faith, while the claims of its own nationals were still in litigation before a tribunal which

it had itself created (Executive Agreement August 10, 1922 (42 Stat. 2200)), of releasing 80% of the German assets held in trust for American nationals, under the Treaty of Berlin, and substituting therefor the since proved worthless unsecured bonds of the German Reich, as guarantee of the payment of awards (the amount of which was not then known) which the United States had bound itself to collect as trustee for present and then future awardholders. The United States let those bonds go to default in 1931, not only without action on its part but with its passive acquiescence, and piled Ossa on Pelion by continuing until the passage of the Harrison Resolution three years later (48 Stat. 1277) to pay out millions of dollars to German nationals, while its own nationals received nothing. Then, through seizure of enemy assets in the Second World War, having become possessed of outright ownership, without cost to itself, of a vast amount of assets of Germany, the defaulting debtor, the United States converted these assets to its own use (see paragraph 6, pages 30, 31 of Transcript of Record in this Court) and here denies, and by every artifice of specious argument and misleading citation, seeks to evade any liability to these awardholders.

Is it to over-simplify, to use this illustration: If Smith owed Brown One hundred Dollars and gave him a note for it and Brown gave the note to Black who agreed to collect it; later Black turned up with the past due note unpaid but also in personal possession and ownership, without cost to himself, of Five hundred dollars worth of Smith's assets, does it need argument to show that no civilized tribunal would permit Black to keep for himself Smith's assets and apply no part of them to the note Smith had given Brown and Brown had in turn delivered to Black under Black's agreement to collect it?

Page 16: The Respondents grasp at a straw in contending that the Settlement of War Claims Act was an amendment to the Trading with the Enemy Act of 1917 and, hence, subject to the exception as to the latter act, set forth in Sec. 4?1 (e) of the Federal Tort Claims Act. But were this a fair and defensible construction of the last named act, it does not affect the case now here.

There are only two references in the complaints to the Settlement of War Claims Act in Paragraph 16, it is stated that by virtue of the Settlement of War Claims Act, the United States "had and claims to have no interest except as trustee" in the German bonds or the proceeds thereof, "for the sole and exclusive benefit of the holders of awards of the Mixed Claims Commission, United States and Germany." The only other reference is in the first prayer for relief "in such amounts as are respectively due them on awards of the Mixed Claims Commission, United States and Germany under the Settlement of War Claims Act." *By no conceivable distortion of the allegations of these complaints can it be argued that the petitioners are claiming under the Settlement of War Claims Act.*

To restate succinctly the position of the petitioners, it is this:

> By the Treaty of Berlin, Germany relinquished any claim on behalf of its nationals to a huge amount of seized enemy property for the declared purpose of paying the private war losses of American nationals and the United States received and accepted it for that express purpose. The United States diverted over 80% of this property to other uses and in December 1948 there was none left to pay approximately $100,000,000 still due on legal awards to American nationals. In the interval, the United States had become vested with another huge amount of German property as the result of

the Second World War. These petitioners in 1947, having foreseen the inevitable result, as to World War I German assets, which was demonstrated in fact at the end of 1948, began this action to impress a trust on the property of Germany seized in World War II, before any use or disposition had been made of it and before any other claims, legal or equitable, existed or were asserted against it.

Two causes of complaint were stated, with a single objective but with alternative relief asked: either that, to the extent necessary to make whole these petitioners and other holders of awards, the United States pay off the German bonds out of the German assets in its possession; or, if it failed in that duty, that the United States respond as woud any private trustee for the violation of the trust for these awardholders.

The legal philosophy of the petitioners' prayer is indicated in two cases, not cited as here factually in point, but for their learned opinions, both of which cases have been before this court.

Bradford (also cited as *Berger*) v. *Chase National Bank of the City of New York,* 24 Fed. Supp. 28; 309 U. S. 632, 84 L. Ed. 990;

Hartford Accident and Indemnity Company v. *Petroleum Royalties Company of Oklahoma, et al.,* 24 Fed. Supp. 759; 308 U. S. 626, 84 L. Ed. 522.

In the former, the late Judge Woolsey wrote:

"The basis of constructive trusts, such as the plaintiffs seek, is knowledge of wrongdoing. This knowledge may be inherent in the situation as in cases of constructive trusts imposed on malefactors or it may be based on notice, as where a party has

received a res innocently, and, after notice, refuses to return it or make restitution for it.

"Put at their highest for the plaintiffs, these causes are of the latter kind, and, assuming all the plaintiffs' contentions herein, nothing occurred to make it against conscience for the Philippine Government to take the bonds voluntarily turned over to it as pledges by their owners, or to sell them in due course with the consent of their owners so as to liquidate those pledges, and thereafter to deposit the proceeds of such liquidation in a bank of deposit and to use the proceeds in the ordinary course of its business, until it received notice from the several plaintiffs of their claims for restitution. In causes of this kind it is only retention after notice which would constitute a wrong in equity. Adams *v.* Champion, 294 U. S. 231, 236, 55 S. Ct. 399, 401, 79 L. Ed. 880; Holley *v.* Missionary Society, 180 U. S. 284, 290, 21 S. Ct. 395, 45 L. Ed. 531."

In the latter, the opinion reads in part:

"Constructive trusts are children of equity and they are recognized by all the courts, as evidenced by the many authorities quoted by the defendants. I am convinced, therefore, that the corporation was by the District Court, in its decision, supra, created as a constructive trustee for the trust estate and was as said in Rollow *v.* Taylor, 104 Okl. 275, 231 P. 224, syllabi 1 and 2:

'Trusts are children of equity, and equity delights especially, when the case has a flavor of fraud, in protecting trusts and in obliging trustees and trust estates to render to all men their dues.

'"Constructive trusts" are such as raised by equity in respect of property which has been acquired by fraud, or where, though acquired without fraud, it is against equity that it should be retained by him who holds it.'"